81-2263

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH P. UZZOLINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Statement of the Questions Involved

1. Whether a verdict can be allowed to stand where the jury patently disregarded the instructions of the trial court.

2. Whether an act in formation of a conspiracy can serve as the required overt act under the General Conspiracy Act.

3. Whether a refusal or failure of the Court of Appeals to consider the specific points raised in Appellant's Brief constitutes the deprivation of life, liberty or property without due process of law.

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NO.

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JOSEPH P. UZZOLINO,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Joseph P. Uzzolino, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on April 14, 1982. (Appendix A)

Opinion Below

The opinion of the Court of Appeals for the Third Circuit was by judgment order and is printed in full as Appendix A.

Jurisdiction

The Judgment of the Third Circuit Court of Appeals was entered on April 14, 1982. Subsequently, a Petition for Rehearing and a Suggestion for Rehearing En Banc was denied on May 24, 1982. (Appendix B) The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

Constitutional Provisions Involved

Fifth Amendment to the Constitution of the United States. (reprinted as Appendix C)

Statute Involved

Title 18, United States Code, Section 371. (reprinted as Appendix D)

Statement of the Case

The Petitioner, Joseph P. Uzzolino, an officer of a Teamster Local and a Trustee of the Pension and Welfare Fund of that same Local, was indicted by a Federal Grand Jury in the District of New Jersey and charged in eleven counts with violations of Title 18, *United States Code,* Section 371, General Conspiracy; Title 18, *United States Code,* Section 664, Embezzlement from the Employee Benefit Plan and Title 18, *United States Code,* Section 1954, Acceptance of Fees to Influence Operation of the Benefit Plan. After trial before a District Judge and a jury, Petitioner was acquitted on all Counts except the First Count which charged the conspiracy to

receive fees with the intent to be influenced with respect to the Pension & Welfare Funds matters. After trial, the trial court granted a motion under Rule 29(c) of the *Federal Rules of Criminal Procedure* and entered a Judgment of Acquittal on the conspiracy count. Subsequently, the government appealed to the Court of Appeals for the Third Circuit from that Judgment of Acquittal. The Court of Appeals reversed the judgment and ordered Petitioner's conviction on that single count to be reinstated. After denial of a Petition for Rehearing with an alternative suggestion of rehearing en banc, the Petitioner appeared in the District Court for sentencing.

Uzzolino was sentenced to five years imprisonment for conspiracy. Thereafter, a timely appeal was filed from that Judgment and, after argument, the Court of Appeals for the Third Circuit affirmed the Judgment of the District Court on April 14, 1982. The court, in its Judgment Order, misconstrued or ignored the principal point raised by Petitioner on his appeal. The court, in that Order, stated:

> "He contends that the court erred:
>
> "(1) in failing to grant a new trial because of inconsistencies in the verdict . . ." (Appendix A)

That point was not advanced or argued by Petitioner. Instead, his principal point was the same as asserted in this Petition.

Uzzolino again petitioned for rehearing with a suggestion for rehearing en banc. That petition pointed out to the court the fact that it had misconstrued or failed to consider the principal argument made on the appeal. Nevertheless, the Petition was denied on May 24, 1982.

Statement of the Reasons for Granting the Writ

1. The jury, in its verdict, patently demonstrated that it had failed to follow the instructions given to it by the trial court.

In its instructions to the jury, the trial court submitted the conspiracy count to the jury on the specific theory that the said conspiracy was divided into two parts embracing different criminal objects. The two parts were described by the court in a supplemental charge to the jury in response to a specific question propounded by the jury. That question was

> "The jury requests a clarification of the crime of conspiracy as you charged us. Particularly as to whether each and every one of the paragraphs 12 through 16 of Count One of the Indictment must have occurred for a conspiracy to have taken place."

The Court responded as follows:

> "Now, in order to determine what the government must prove here, you first go to Paragraph 11 to see whether the government has proved the conspiracy that's alleged. As I indicated to you, it must be the conspiracy that's charged and no other conspiracy.
>
> "To identify the conspiracy charged, the government is contending—and the indictment refers to two parts—the first part, the lawsuit part, in 12 and 13; and the second part, the owner-operator part, in 14 and 15.
>
> "The government need not prove both parts if it proves beyond a reasonable doubt the first part, but does not prove beyond a reasonable doubt the

second part but yet you find that Paragraph 11 has been proved beyond a reasonable doubt and Paragraphs 12 and 13 have been proved beyond a reasonable doubt, then the conspiracy charged can be said to have existed.

"Additionally, if the government under your finding has not proved beyond a reasonable doubt the lawsuit part but has proved beyond a reasonable doubt the ownership part, then once again, if you find the government has proved beyond a reasonable doubt the conspiracy charged in Paragraph 11 and that part that is charged in Paragraphs 14 and 15, then it can be said that the conspiracy charge existed."

The parts of Count One of the First Count of the Indictment which are referred to, by the Court, involve in paragraph 11 the general allegations of a conspiracy to violate the provisions of Title 18, *United States Code*, Section 1954. Paragraphs 12 and 13 related to what was described by the trial court as the "lawsuit part" while paragraphs 14 and 15 related to the so-called "owner-operator part". The court therefore, in response to the jury's question, directed the jury that, in order to convict, they must find either that the defendant committed the acts alleged in paragraphs 11, 12 and 13 or that he did commit the acts alleged in paragraphs 11, 14 and 15. The jury instead made a finding which did not follow the stated instructions. They announced that they had found that the government had proved the allegations of paragraphs 11 and 12 beyond a reasonable doubt but made no such finding as to paragraph 13. The jury further announced that they did not find that the government had proved the allegations of paragraphs 14 and 15.

The instructions given by the court were specific and to the point. It is certain that the jury disregarded the court's instructions and took the law into its own hands.

In order to understand exactly what the jury did it might be well to review the allegations of the Indictment. For convenience, we paraphrase the pertinent parts of the Indictment which is appended hereto as Exhibit E.

The Indictment, in pertinent part, charged, in paragraph 11, that in and around November, 1975, the defendant, Uzzolino, conspired with others to commit offenses, that is, to receive kick-backs because of and with the intent to be influenced with respect to decisions relating to the Welfare and Pension Funds. Paragraph 12 stated that it was part of the conspiracy that the co-conspirators used their influence to delay collection of $80,000 due from Towers Transportation, Inc. to the Pension and Welfare Funds in return for payments to the defendant. Paragraph 13 stated that it was a further part of the conspiracy that $10,000 was delivered to the defendant in return for aid in delaying the collection of the aforesaid obligation due to the Pension and Welfare Funds. Those allegations pertain to the "lawsuit part" of the case.

The second part of the Indictment, as it was broken down by the court, related to the "owner-operator part" and with the repetition of paragraph 11 as aforesaid it charged in paragraph 14 that it was further part of the conspiracy that the conspirators would permit Towers Transportation and others to employ owner-operators of trucks who were not members of the Local without interference in return for cash to be paid to the defendants. Paragraph 15 charged that it was part of the conspiracy that from February through September, 1976, the defendants were paid at least $1,000 per month.

By designating paragraphs 11, 12 and 13 as the "lawsuit part" and by designating paragraphs 11, 14 and 15 as the "owner-operator part", the court made definite and specific rules which the jury was required to follow. The jury ignored the court's instructions by making a finding of guilt, beyond a reasonable doubt, on the basis of paragraphs 11 and 12 only.

It is a basic principle of our jury system that the jury must apply the law as the court instructs. *Delli Paoli* v. *United States,* 352 U.S. 231, 77 Sup. Ct. 294, 1 L. Ed. 2nd 278 (1957). While we bear in mind that there is a presumption that the jury conscientiously followed the court's instructions, *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 83 Sup. Ct. 448, 9 L. Ed. 2d 357; reh. den. 372 U.S. 950, 83 Sup. Ct. 931, 9 L. Ed. 2d 975 (1963), the presumption is overcome, without question, by the clear showing made here that the jury did in fact disregard its instructions. See also *Stein* v. *People of State of New York,* 346 U.S. 156, 73 Sup. Ct. 13, 98 L. Ed. 1522; reh. den. 346 U.S. 842, 74 Sup. Ct. 13, 98 L. Ed. 362 (1953).

It is the position of the Petitioner here that he has, at every stage of the proceeding, complained concerning the inadequacy of the jury finding in the light of the instructions given by the court. The trial court and the Appellate Court have disregarded the obvious fact that the jury did not follow the instructions of the court. This court should exercise its supervisory powers over the courts of the United States in this instance by granting the Petition.

2. The petitioner is entitled to a new trial for the reason that the jury may have based its verdict upon an improper premise.

In the trial of the case, the jury, by its verdict on all of the various counts set forth in the Indictment eliminated from the conspiracy count the possibility that the defendant had committed any of the overt acts alleged to have been committed in furtherance of that conspiracy. After eliminating all of the overt acts which substantially parroted the allegations of the substantive counts upon which the defendant was acquitted, there remained but a single alleged act. That act which was characterized in the Indictment as "an overt act" is as follows:

> "1. In and around November, 1975, the defendant, Joseph P. Uzzolino, had a conversation with Sam Mor."

It should be noted that the Indictment alleges that the conspiracy itself was formed in and around November of 1975. The individual identified as Sam Mor was the owner of Towers Transportation, Inc. and was designated during the trial as an alleged co-conspirator. The evidence produced at the trial made it clear that the meeting which was referred to in the "over act" number 1 constituted the actual formation of the conspiracy, if any. It is clear that the government may ordinarily succeed in a conspiracy case by proving overt acts not mentioned in the Indictment, *United States* v. *Negro*, 164 F. 2d. 168, 171-172 (2nd Cir. 1947); See also *U.S.* v. *Adamo*, 534 F. 2d. 31 (3rd Cir. 1976) cert. den. *Kearney* v. *U.S.*, 429 U.S. 841, 97 Sup. Ct. 116, 50 L. Ed. 2d 110 (1976). In the foregoing cases, the general holding was that the substitution of proof of an unalleged overt

act for an alleged act does not constitute a fatal variance in the proofs. In the present case, there was nothing in the case to warn the defendant or to indicate to the jury that the government intended to rely upon proof of any act other than the ones alleged to establish the criminality of the alleged conspiracy. There was no way that the Appellant could have anticipated that the jury would have ruled out all of the overt acts which related to the substantive offenses and there is no way now that it can be determined whether the jury in fact erroneously relied upon a determination that the first overt act alleged (which constituted the formation of the alleged agreement) was sufficient to support its verdict on the conspiracy charge. Cf. *U.S.* v. *Sarno,* 456 F. 2d 875 (1st Cir. 1972).

It is axiomatic that the charge under Title 18, United States Code, Section 371 can be proven only by a demonstration, beyond a reasonable doubt, that an unlawful agreement was reached and in addition, that an independent act was done to further the objects of the unlawful agreement. *U.S.* v. *Williams,* 474 F2d 10, 47 (5th Cir. 1973). Although there might have been many other overt acts upon which the jury could have based its finding, it is not clear that the jury disregarded overt act number 1. It is therefore the position of the Petitioner that logically and following the instructions of the court, the jury might have found guilt relying upon overt act number 1 to make the conspiracy as alleged criminal and therefore punishable. In the Third Circuit, the case of *United States* v. *Dansker,* 537 F2d 40 (3rd Cir. 1976), cert. den. 429 U.S. 1038, 97 S. Ct. 732, 50 L. Ed. 748, appeal after remand 561 F2d 485 (3rd Cir. 1976), appeal after remand 565 F2d 1262 (3rd Cir. 1976) cert. dismissed, 434 U.S. 1052, 98 S. Ct. 905, 54 L. Ed. 2d 805, mandates a reversal of the conviction since it

is impossible now to determine whether the jury actually based its verdict upon the erroneous premise that the overt act number 1 as alleged could support a conspiracy conviction.

It is the position of the Petitioner that the Court of Appeals for the Third Circuit ignored its own decision and the decision of other Circuits in affirming the Judgment of Conviction against him and he therefore requests this court to exercise its supervisory powers over the courts of the United States by granting this Petition.

3. The Court of Appeals refused or failed to consider the arguments advanced on appeal by petitioner.

The arguments advanced by the Petitioner here in paragraphs 1* and 2** above, were the same arguments presented to the Court of Appeals. The court persisted in denying the appeal as one directed toward an alleged inconsistency in the verdict. That point had been raised on the previous appeal in the same case. *U.S.* v. *Uzzolino,* 651 F2d 207 (3rd Cir. 1981); reh. den. —— F2d —— (1981); cert. den. —— U.S. —— (1981). That point was not, in any manner, raised in the Court of Appeals on the second appeal. Through the Petition for Rehearing filed in May of 1982, the Petitioner endeavored to inform the Court of Appeals of its misunderstanding of his arguments. The court, without opinion, denied the Petition for Rehearing and further refused Petitioner's suggestion for rehearing en banc.

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* Failure of the jury to follow the Court's instructions.

** Verdict was based upon an improper premise.

The situation in this case resembles that which prevailed in the matter of *Proctor* v. *Warden*, 435 U.S. 559, 98 Sup. Ct. 1596, 56 L. Ed. 2d 547 (1978) where this court said, "To perform its high function in the best way, 'justice must satisfy the appearance of justice.'" See also *Offutt* v. *U.S.*, 348 U.S. 11, 14, 75 Sup. Ct. 11, 99 L. Ed. 11 (1954); *In re Murchinson*, 349 U.S. 133, 136, 75 Sup. Ct. 623, 99 L. Ed. 942 (1955). Though the points referred to constituted the principal arguments made by petitioner in the Court of Appeals, that Court never dealt with them.

It is Petitioner's position that the failure or refusal of the court below to consider the arguments as set forth hereinabove in 1 and 2 amounted to the deprivation of his Constitutional rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons and for the reason that, because of the actions as aforesaid, the Petitioner has been denied due process in the Federal Courts, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: June 7, 1982

[Appendix Follows]

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-3100

UNITED STATES OF AMERICA,

Appellee,

vs.

UZZOLINO, JOSEPH P.,

Appellant.

(D.C. Crim. No. 79-00366-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 30, 1982

Before: Gibbons, Sloviter and Becker, *Circuit Judges*

Appendix A

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JUDGMENT ORDER

Joseph P. Uzzolino appeals from a judgment of sentence following his conviction for violation of 18 U.S.C. §§ 664 and 1954. He contends that the court erred:

(1) in failing to grant a new trial because of inconsistencies in the verdict;

(2) in admitting the testimony of Albert Personnet, an attorney for a Union Pension and Welfare Fund of which Uzzolino was an officer. We find no reason for setting aside the jury's verdict. *See United States* v. *Uzzolino,* 615 F.2d 207 (3d Cir. 1981). Assuming Uzzolino could claim the attorney client

privilege with respect to Parsonnet's testimony, the testimony was admissible under the crime-fraud exception. *Clark* v. *United States*, 289 U.S. 1 (1933).

IT IS ORDERED and ADJUDGED that the judgment of the district court will be affirmed.

By the Court,

JOHN J. GIBBONS
Circuit Judge

Attest:

Sally Mrvos, Clerk

Dated: Apr. 14, 1982

APPENDIX B

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-3100

UNITED STATES OF AMERICA,

Appellee,

vs.

UZZOLINO, JOSEPH P.,

Appellant.

(D.C. Crim. No. 79-00366-01)

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge,* Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter and Becker, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

John J. Gibbons
Judge

Dated: May 24, 1982

APPENDIX C

Constitutional Provision Involved

Amendment V:

"Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX D

Relevant Statute Involved

Title 18 United States Code Section 371:

"§371. Conspiracy to commit offense or defraud United States

If two or more persons conspire either to commit any offense against the United States, or defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

APPENDIX E

Indictment (Paragraphs 11 to 15)

Excerpt from Count I of the indictment as it was submitted to the jury,

> "11. From in and around November 1975 until approximately in and around the end of 1976 at Elizabeth in the District Court of New Jersey and elsewhere, the defendants
>
> Joseph P. Uzzolino,
> Joseph A. Uzzolino and
> Joseph Amendola
>
> did knowingly and wilfully combine, conspire, confederate and agree with each other and with others to commit offenses against the United States, that is . . . to receive funds, kickbacks, commissions, gifts, loans, money and things of value because of and with the intent to be influenced with respect to actions, decisions and other duties relating to questions and matters concerning the Welfare Fund and the Pension Fund in violation of Title 18, United States Code, Section . . . and 1954.
>
> 12. It was further part of said conspiracy that the defendants and co-conspirators agreed to use their influence to delay, obstruct and hinder the collection of in excess of $80,000 in debts already accrued and due from Tower Transportation, Inc. to the Pension Fund and the Welfare Fund in return for cash to be paid to the defendants and co-conspirators.

Appendix E

13. It was a further part of said conspiracy that $10,000 was delivered to the defendants and co-conspirators in return for their aid in delaying and obstructing and hindering the action of collection of the outstanding debt of in excess of $80,000 to the Pension Fund and Welfare Fund due to the period prior to November 7, 1975.

14. It was a further part of said conspiracy that co-conspirators would permit Towers Transportation, Inc. and Far East Truck Leasing, Inc. to employ a large number of owner-operators of trucks who were not members of Local 478 and for whom contributions to the Pension Fund and the Welfare Fund were not required, without interference in return for cash and other items of value to be paid to the defendants and co-conspirators.

15. It was a further part of said conspiracy that from approximately February through September, 1976, the defendants and co-conspirators were paid at least $1,000 per month."